

**Dato' Kuah Tian Nam v Tan Wrun Peng**

A

HIGH COURT (KUALA LUMPUR) — CIVIL SUIT NO S3-22-339 OF  
2008

ZABARIAH MOHD YUSUF JC

17 JULY 2009

B

*Bankruptcy — Capacity of bankrupt — Whether bankrupt plaintiff had locus  
standi to institute proceedings against defendant — Whether bankrupt plaintiff  
obtained prior sanction of official assignee to proceed with claim — Bankruptcy  
Act 1967 ss 38(1)(a) & 104*

C

*Civil Procedure — Striking out — Application to strike out action — Whether  
plaintiff had locus standi — Whether action statute barred*

D

*Trusts and Trustees — Trusts — Existence of — Proof — Onus of proving —  
Whether there was intention to create trust — Whether presumption of gift  
rebutted by evidence of trust*

E

It was the plaintiff's case that in or around 1991 he had, at the request of the  
defendant, transferred the property known as 35 Jalan 5/98 in Jalan Cheras,  
56100 Kuala Lumpur ('the property') to the defendant on the oral agreement  
that the defendant would hold the property on trust and act as a trustee for  
the benefit and interest of the plaintiff. After 8 January 2008, the plaintiff had  
demanded that the defendant re-transfer the property to the plaintiff but  
despite repeated demands the defendant had failed to do so. The plaintiff  
then instituted the present action against the defendant for the return of the  
property or alternatively if the property is sold for the recovery of the sale  
proceeds from the disposal of the property. In her defence the defendant  
contended that her mother and the plaintiff had cohabited since 1976 and  
that the property was registered in her name as a gift to her by the plaintiff  
when he was cohabiting with her mother. The defendant produced  
photographic evidence in support of the relationship between her mother and  
the plaintiff. Pending the trial of this action, the defendant filed the current  
application to strike out the plaintiff's claim. Her application was premised  
on the grounds that the plaintiff was a bankrupt and therefore had no locus  
standi to institute proceedings against the defendant and that the plaintiff's  
action against the defendant in respect of the property was statute barred. In  
reply the plaintiff averred that he had been adjudicated a bankrupt on 9 April  
1999 by the courts in Singapore and that he was not a bankrupt in Malaysia.

F

G

H

I

**A Held** allowing the application with costs:

- B** (1) Section 104 of the Bankruptcy Act 1967 ('the Act') provides for reciprocal provisions between Singapore and Malaysia in all matters of bankruptcy and insolvency. Thus, since the plaintiff had been adjudicated a bankrupt by the Singapore courts he had no locus standi to institute the action herein unless he had obtained the prior sanction of the official assignee as provided under s 38(1)(a) of the Act. In the instant case the plaintiff had not obtained the prior sanction of the official assignee or provided evidence of being discharged as a bankrupt.
- C** As such based on this fact alone the plaintiff's writ and statement of claim can be struck out with costs (see para 20).
- D** (2) There was no reason forwarded by the plaintiff as to why the property was registered in the name of the defendant in the first place, whereas the explanation given by the defendant that the property was registered in her name as a gift due to the special relationship between the plaintiff and the defendant's mother seemed more plausible. Further, the plaintiff failed to show proof of any trust reduced to writing in respect of the property and in fact there was no proof of the trust being created save for the bare assertions of the plaintiff (see paras 29 & 34).
- E** (3) To rebut the presumption of a gift, which is given statutory recognition in Malaysia under s 26 of the Contracts Act 1950, the plaintiff must prove the trust clearly and distinctly. However, the plaintiff in the instant case had neither shown proof of the alleged trust or trust document nor shown evidence of the terms of the trust pleaded. Thus there was never any trust intended by the plaintiff (see para 35).
- F** (4) The claim by the plaintiff was clearly statute barred. The defendant was the registered proprietor of the property on 23 February 1991 and the plaintiff only instituted the present action against the defendant on 21 March 2008, after the six year limit had passed (see para 39).
- G**

**[Bahasa Malaysia summary]**

- H** Adalah kes plaintif bahawa sekitar tahun 1991, atas permintaan defendan, dia telah memindah milik hartanah yang dikenali sebagai 35 Jalan 5/98 di Jalan Cheras, 56100 Kuala Lumpur ('hartanah tersebut') kepada defendan atas perjanjian lisan bahawa defendan akan memegang hartanah tersebut sebagai amanah dan bertindak sebagai pemegang amanah untuk faedah dan kepentingan plaintif. Selepas 8 Januari 2008, plaintif menuntut defendan memindah milik hartanah tersebut kepadanya, namun setelah beberapa tuntutan, defendan masih gagal berbuat demikian. Plaintif kemudiannya memulakan tindakan ini terhadap defendan untuk pemulangan hartanah tersebut atau secara alternatifnya jika hartanah tersebut dijual, wang jualan
- I**

hartanah tersebut diberikan kepada plaintif. Dalam pembelaannya, defendan menghujah bahawa ibunya dan plaintif bersekedudukan sejak 1976 dan hartanah tersebut didaftarkan atas namanya sebagai hadiah kepadanya semasa plaintif bersekedudukan bersama ibu plaintif. Defendan mengemukakan keterangan bergambar untuk menyokong hubungan antara ibunya dan plaintif. Semasa menunggu perbicaraan kes ini, defendan memfailkan permohonan ini untuk membatalkan tuntutan plaintif. Permohonannya adalah berdasarkan alasan-alasan bahawa plaintif seorang yang bankrap dan oleh itu tiada locus standi untuk memulakan prosiding terhadap defendan dan bahawa tindakan plaintif terhadap defendan berkaitan dengan hartanah tersebut dihadkan oleh masa. Sebagai balasan, plaintif menyatakan bahawa dia telah dihukum menjadi bankrap pada 9 April 1999 oleh mahkamah Singapura dan dia bukanlah seorang bankrap di Malaysia.

**Diputuskan,** membenarkan permohonan dengan kos:

- (1) Seksyen 104 Akta Kebankrapan 1967 ('Akta') memperuntukkan peruntukan-peruntukan bersaling antara Singapura dan Malaysia dalam kesemua perkara kebangkrapan dan ketaksolvenan. Maka, memandangkan plaintif telah dihukum bankrap oleh mahkamah Singapura, dia tiada locus standi untuk memulakan tindakan mahkamah di sini kecuali dia telah mendapat sanksi daripada pegawai pemegang harta seperti yang diperuntukkan di bawah s 38(1)(a) Akta. Dalam kes ini, plaintif tidak mendapat sanksi daripada pegawai pemegang harta atau mengemukakan keterangan bahawa dia seorang bankrap yang dilepaskan. Maka, berdasarkan fakta ini sahaja, writ dan penyata tuntutan plaintif boleh dibatalkan dengan kos (lihat perenggan 20).
- (2) Tiada alasan diberikan oleh plaintif tentang mengapa hartanah tersebut didaftarkan atas nama defendan, manakala alasan yang diberikan defendan bahawa hartanah itu didaftarkan atas namanya sebagai hadiah berikutan hubungan istimewa antara plaintif dan ibunya kelihatan lebih berkemungkinan. Selanjutnya, plaintif gagal menunjukkan bukti apa-apa amanah bertulis berkaitan dengan hartanah tersebut dan bahawa tiada bukti tentang amanah tersebut dibuat melainkan kenyataan plaintif semata-mata (lihat perenggan 29 & 34).
- (3) Untuk mematahkan anggapan hadiah, yang telah diberikan pengiktirafan perundangan di Malaysia di bawah s 26 Akta Kontrak 1950, plaintif mesti membuktikan amanah tersebut dengan nyata dan jelas. Walau bagaimanapun, dalam kes ini, plaintif tidak menunjukkan sama ada bukti amanah yang didakwanya mahupun dokumen amanah ataupun bukti terma-terma amanah yang diplidkan. Maka, tiada amanah yang dimaksudkan oleh plaintif (lihat perenggan 35).

- A (4) Tuntutan plaintif adalah jelas dihadkan oleh masa. Defendan merupakan pemilik berdaftar hartanah tersebut pada 23 Februari 1991 dan plaintif hanya memulakan tindakan ini terhadap defendan pada 21 Mac 2008, setelah tempoh enam tahun tersebut tamat (lihat perenggan 39).]

B  
**Notes**

For cases on application to strike out action, see 2(2) *Mallal's Digest* (4th Ed, 2007 Reissue) paras 6696–6702.

- C For cases on whether bankrupt plaintiff had locus standi to institute proceedings against defendant, see 1 *Mallal's Digest* (4th Ed, 2005 Reissue) paras 2330–2354.

**Cases referred to**

- D *Amos William Dawe v Development & Commercial Bank (Ltd) Berhad* [1981] 1 MLJ 230, FC (folld)

*Bangkok Bank Company v Thye Nam Holdings Sdn Bhd & Anor* [2005] MLJU 182; [2005] 6 CLJ 457, HC (folld)

- E *Chin Khi Min Ex P Amfinance Bhd Re* [2005] 7 CLJ 382, HC (refd)  
*Goh Eng Hua v M/S Laksamana Realty Sdn Bhd* [2004] 3 MLJ 97; [2003] 6 AMR 585, CA (refd)

- Palaniappa Chettiar v Arunasalam Chettiar* [1962] MLJ 143, PC (refd)  
F *Sabah Bank Bhd v Syarikat Bintang Tengah Sdn Bhd & Ors* [1992] 2 MLJ 588, HC (folld)

*Syarikat Ong Yoke Lin Sdn Bhd v Giant Cash & Carry Sdn Bhd & Ors* [2000] MLJU 519; [2000] 4 AMR 4982, HC (folld)

G **Legislation referred to**

Bankruptcy Act 1967 ss 38(1)(a), 104

Contracts Act 1950 s 26

Limitation Act 1953 s 22(2)

Rules of the High Court 1980 O 18 r 19(1)(b), (c), (d)

- H *KL Chan (CY Leong with him) (Ching Tan & Associates) for the plaintiff.*  
*Harpal Singh (Thomas Ong Leong & Associates) for the defendant.*

**Zabariah Mohd Yusof JC:**

I

[1] This is an application in encl 6 by the defendant to strike out the plaintiff's writ and statement of claim dated 21 March 2008 under O 18 r 19(1)(b), (c) and (d) of the Rules of the High Court 1980.

[2] The defendant premised her ground on the following for the striking out application:

- (a) the plaintiff is a bankrupt;
- (b) the action herein is statute barred.

#### BACKGROUND

[3] The defendant's mother (Lee Siok Poh) had worked in the plaintiff's father construction company. The plaintiff's father's was a Singapore citizen and trading under the name Kuah Sai Yoke Construction Co. This company subsequently became known as Pembinaan KSY Sdn Bhd after public listing.

[4] On 14 October 1967, the defendant's mother married with one Tan See Tuan and had a daughter ie the defendant's in this case.

[5] The defendant's mother subsequently became one of the directors of Pembinaan KSY Sdn Bhd.

[6] It was contended by the defendant that the defendant's mother and the plaintiff had cohabited since 1976 and the plaintiff had taken in the defendant as his own daughter. The defendant contends that the plaintiff had on numerous occasion went for holiday trips together with the defendant's mother. These were evidenced by the photographs in exh 'TWP 4' in encl 9.

[7] The defendant had also exhibited a form in exh TWP 3 in encl 6 which states the defendant's mother as the wife to the plaintiff.

[8] The relationship between the plaintiff and the defendant's mother ended when the plaintiff started to have a relationship with another woman.

[9] The plaintiff's cause of action, inter alia, for a declaration that the defendant holds the property known as No 35, Jalan 5/98, Taman Supreme, Batu 5, Jalan Cheras, 56100 Kuala Lumpur and held under Geran 8863, Lot 40780 Mukim Kuala Lumpur, Daerah Kuala Lumpur, Negeri Wilayah Persekutuan ('the said property') as a trustee for the benefit and interest of the plaintiff or alternatively, if the said property is sold, the defendant shall hold the proceeds of sale of the said property for the benefit and interest of the plaintiff, and for an order to account for all monies and rentals received by the defendant.

#### THE PLAINTIFF'S CONTENTION

[10] Sometime in or around 1991, and at the request of the defendant, the

- A** plaintiff had transferred the said property to the defendant on the understanding and/or oral agreement that the defendant shall hold the said property on trust for the benefit and interest of the plaintiff. At all material time, the defendant did not make any payment or make any contribution for the purchase of the said property. The entire purchase price for the
- B** acquisition of the said property was solely provided by the plaintiff and that all costs and expenses incurred for the up-keeping, maintenance and improvement of the said property, quit rent and assessment were solely provided for and paid by the plaintiff.
- C** [11] The plaintiff had purchased the said property through a financing obtained from his financier, Citibank Bhd and that the plaintiff had used his own resources/monies to settle the outstanding loan with the financier.
- D** [12] At the time when the said property was transferred by the plaintiff to the defendant, it was then agreed between the parties that the defendant shall hold the said property on trust and shall act as a trustee for the interest and benefit of the plaintiff.
- E** [13] The plaintiff had transferred the said property to the defendant and registered the said property in the name of the defendant upon reliance of an understanding and/or oral agreement that the defendant shall hold the said property on trust for the plaintiff and that the defendant had agreed to
- F** re-transfer back the said property to the plaintiff as and when directed to do so by the plaintiff. At all material times, the defendant acts as a trustee for the plaintiff and act as a beneficial owner of the said property.
- G** [14] Sometime on 8 January 2008, the plaintiff had instructed his solicitors to demand from the defendant to re-transfer back the said property to the plaintiff but despite repeated demands and/or requests made, the defendant had failed and/or refused to do so.
- H** [15] In the circumstances, the plaintiff had instituted legal proceedings against the defendant for the return of the said property or alternatively, if the said property is sold, for the recovery of the sale proceeds from the disposal of the said property.
- I** [16] Pending the trial of this action, the defendant filed an application to strike out the plaintiff's claim purportedly on the ground that the plaintiff had cohabited with the defendant's mother, Lee Siok Poh (LSP) as a husband and wife. The defendant also sought to rely on exh 'TWP4' in support of the alleged finding of fact and as a basis for this court to strike out the plaintiff's claim.

## THE PLAINTIFF IS A BANKRUPT

A

[17] The plaintiff had been adjudicated a bankrupt on 9 April 1999 vide Bankruptcy No B 314/1999 by the courts in Singapore (refer to exh TWP1 in encl 6).

B

[18] The plaintiff in his affidavit in para 3 of encl 7 avers that he is not a bankrupt in Malaysia. That may be so however pursuant to s 104 of the Bankruptcy Act 1967 which states as:

C

(1) The High Court and the officers thereof shall in all matters of bankruptcy and insolvency act in aid of and be auxiliary to the courts of the Republic of Singapore or any designated country having jurisdiction in bankruptcy and insolvency so long as the law thereof requires its courts to act in aid of and be auxiliary to the courts of Malaysia.

D

[19] It provides for reciprocal provisions between Singapore and Malaysia in all matters of bankruptcy and insolvency.

[20] Since the plaintiff had been adjudicated a bankrupt by the Singapore courts, the plaintiff has no locus standi to institute the action herein and s 38(1)(a) of the same Act provides that the prior sanction of the official assignee is required for the plaintiff to institute any action. I find support in the case of:

E

(i) *Amos William Dawe v Development & Commercial Bank (Ltd) Berhad* [1981] 1 MLJ 230 where the appellant in the appeal concerned was discovered to have been adjudicated a bankrupt by the High Court of Singapore prior to the filing of the action, and the Federal Court held that as the appellant had been adjudicated a bankrupt by the Singapore courts, and in the absence of leave from the official assignee, the appeal was struck out.

F

G

(ii) *Bangkok Bank Company v Thye Nam Holdings Sdn Bhd & Anor* [2005] MLJU 182; [2005] 6 CLJ 457 where the High Court held that the second defendant was made a bankrupt at the behest of the plaintiff on 4 November 1994 in Singapore High Court. Under the bankruptcy laws of both Malaysia and Singapore, all the bankrupt's property would vest in the official assignee and all proceedings should not be taken against the bankrupt from then onwards. So long as the second defendant was an undischarged bankrupt, he had no capacity to enter into any contract;

H

I

(iii) *Sabah Bank Bhd v Syarikat Bintang Tengah Sdn Bhd & Ors* [1992] 2 MLJ 588 where the court held that 'Once receiving and adjudication orders are made, the bankrupt's estate vests with the OA and under

A s 38(1)(a) of the Bankruptcy Act 1967, the OA must first be consulted as any action intended by the bankrupt may be detrimental to his creditors... Accordingly, the third defendant must first obtain the OA's sanction and since this was not done, he had no locus standi to file the application'.

B [21] In the case of *Goh Eng Hwa v M/S Laksamana Realty Sdn Bhd* [2004] 3 MLJ 97; [2003] 6 AMR 585, it was ruled by the Court of Appeal that:

C Without obtaining the official assignee's sanction, a bankrupt is 'incompetent' to file the counterclaim and the counterclaim would then be null and void.

D [22] In our case herein, the plaintiff had been adjudicated a bankrupt by the Singapore High Court and has not obtained the prior sanction of the official assignee, hence there is no necessity for the court to even look at the merits of the case. This proposition was clearly stated in the case of *Re Chin Khi Min Ex P Amfinance Bhd* [2005] 7 CLJ 382 which held that:

E The appellant did not obtain the requisite sanction stipulated in s 38(1)(a) of the Bankruptcy Act 1967 and the preliminary objection was allowed. In the circumstances, the court did not find it either useful or necessary to consider and determine the issues the appellant sought to raise in this appeal in respect of which the appellant had no capacity to lodge.

F [23] The plaintiff claims that he does not know that there was a petition filed against him for bankruptcy in Singapore as he had been staying in Malaysia. However according to the search done by the defendant as evidenced in exh TWP1 in encl 14, the search shows that there had been an application to set aside the bankruptcy order by the plaintiff on 3 December 1999 and was adjourned to various dates until finally in 9 March 2000 the application was dismissed. After the search was shown to the plaintiff, the plaintiff states that it was not him that applied to set aside the bankruptcy order but it was his ex wife, however the search seems to indicate that it was the ex wife of the plaintiff that filed the bankruptcy proceedings against the plaintiff.

H [24] Hence based on the above the plaintiff has no locus standi to institute this action against the defendant. To date there is no record of the plaintiff being discharged as a bankrupt. On this alone the plaintiff's writ and statement of claim is struck out with costs.

I THE PLAINTIFF'S CLAIM IS STATUTE BARRED

[25] The plaintiff claim that his cause of action is in respect of the recovery of trust property from the defendant.

[26] The defendant in para 5 encl 7 states that:

saya telah dinasihatkan oleh peguamcara saya bahawa saya di sini tidak dihalang atau disekat oleh had masa di bawah s 9 dan/atau di bawah s 22(2) Akta Had Limitasi 1953 (Akta 254) kerana tuntutan saya terhadap defendan adalah di bawah s 22(1)(a) dan (b) Akta Limitasi 1953.

[27] From the above averments made by the plaintiff, the plaintiff claims that the defendant is a trustee on behalf of the plaintiff as far as the land is concerned. The plaintiff claims that the said property was transferred to the defendant at the request of the defendant to impress to the defendant's future husband that the defendant came from a well off family so as to be assured that the marriage would be blessed by the future in laws. However this is denied by the defendant who claims that the said land was a gift from the plaintiff, as the defendant's godfather when the plaintiff and the defendant's mother were staying together as a couple (though unmarried).

[28] The defendant further avers that she had been duly making the necessary payments for the maintenance, assessment and utilities for the said property. Refer to exh TWP7 of encl 5. The plaintiff however failed to show that he has been making the necessary payments for the said land.

[29] From the averments made by the plaintiff that the said property was held by the defendant as trust, there is no evidence to support such contention by the plaintiff. There was no reason forwarded by the plaintiff as to why the property was registered in the name of the defendant in the first place. Compare the averments of the defendant which states as to why the property was registered in her name, ie as a gift to her by the plaintiff when he was cohabiting with the defendant's mother since 1976. The explanation given by the defendant seems to be more plausible. From the exhibits in the affidavits it clearly shows that the plaintiff and the defendant's mother, Lee Siok Poh had intimate relationship and cohabited since 1976. The plaintiff objected to these averments in the affidavits of the defendant, which objection is without basis as the defendant was making the averments based on her personal knowledge of the matter.

[30] Hence, I cannot see any other reasonable explanation for the plaintiff to register the said property in the defendant's name other than as a gift due to the said special relationship once upon a time, that fizzled out when the plaintiff had a change of heart with the defendant's mother.

[31] In the event the defendant does not hold the property in trust for the plaintiff, s 22(2) of the Limitation Act 1953 applies:

- A** Subject as aforesaid, an action by a beneficiary to recover trust property or in respect of any breach of trust, not being an action in which a period of limitation is prescribed by any other provision of this Act, shall not be brought after the expiration of six years from the date on which the right of action accrued.
- B** [32] From the facts, the defendant was the registered owner of the property since 21 March 1991.
- C** [33] The plaintiff failed to show proof of the existence of any trust in respect of the said property. Declaration of trust must be manifested in writing. I find support in the case of *Syarikat Ong Yoke Lin Sdn Bhd v Giant Cash & Carry Sdn Bhd & Ors* [2000] MLJU 519; [2000] 4 AMR 4982 where the court held that:
- D** That a declaration of trust in respect of any land or in respect of any interest must be manifested and proved in writing. According to Grant MR in *Randall v Morgan* (1805) 12 Ves 67 at p 74 it would be sufficient at some later stage that there was some writing which would constitute evidence of the fact of the trust. But, unfortunately in the present, there was no instrument nor writing to manifest the existence of the trust.
- E** [34] Similarly, as in this case, there is no proof of the trust being created save and except by the bare assertions of the plaintiff.
- F** [35] It is trite law that to rebut the presumption of a gift, the plaintiff must prove the trust clearly and distinctly. Refer to the Privy Council case in *Palaniappa Chettiar v Arunasalam Chettiar* [1962] MLJ 143:
- G** Whenever a father transfers property to his son, there is a presumption that he intended it as a gift to his son: and if he wishes to rebut that presumption and to say that his son took as trustee for him, he must prove the trust clearly and distinctly, by evidence properly admissible for the purpose, and not leave it to be inferred from slight circumstances, see *Shephard v Cartwright* [1955] AC 431 at p 445....The father had also to get over this pertinent question: If he intended the son to take as a trustee, why did he not insert on the memorandum of transfer the words 'as trustee' and register the trust as he could have done under s 160 of the
- H** Land Code.
- I** [36] Besides having no proof of the alleged trust or trust document, there is also the absence of evidence of the terms of the trust pleaded by the plaintiff.
- [37] The concept of a gift is given statutory recognition in Malaysia under s 26 of the Contracts Act 1950 in explanation 1 which states as follows:

explanation 1 — Nothing in this section shall affect the validity as between the donor and the donee, of any gift actually made.

A

[38] Thus, from the above there was never any trust intended in the first place.

B

[39] Therefore the claim by the plaintiff herein is clearly statute barred. The defendant was the registered proprietor of the said land in 23 February 1991 and the plaintiff only brought the action herein on 21 March 2008, which has passed the six-year limit.

C

[40] Therefore premised on the aforesaid, the plaintiff's claim against the defendant is clearly frivolous and vexatious and an abuse of the process of court. The application by the defendant is allowed with costs.

D

*Application allowed with costs.*

Reported by Kohila Nesan

E

F

G

H

I